

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL UNDER ARBITRATION ACT NO. 3 OF 2002.

Shri Dynaneshwar Bhiku Dhargalkar,
son of Bhiku Dhargalkar,
of full age, Civil Contractor,
residing at Muguem, Cuncolim,
Salcete, Goa.

.... Appellant.

Versus

1. State of Goa,
Through the Chief Secretary,
Secretariat, Panaji, Goa.
2. Chief Engineer,
PWD WD XIV,
Panaji, Goa.
3. The Executive Engineer,
WD XIV,
Fatorda, Margao, Goa.

.... Respondents.

Mr. D. P. Bhise, Advocate for the Appellant.

Mr. N. K. Sawaikar, Advocate for the Respondents.

CORAM: J. N. PATEL, J.

DATE: 15th DECEMBER, 2006.

ORAL JUDGMENT:

This appeal is directed against the Order dated 18th January, 2002 passed by the Addl. Civil Judge S.D. at Vasco-da-Gama in Special Civil Suit No. 17/99/B whereby dismissing the application filed by the appellant under Section 20 of the Indian Arbitration Act, 1940 on the ground

of limitation.

2. On 28.2.83 the appellant was awarded work of widening and improvement of geometrical of NH 17A Cortalim Vascp Rpad Part II between Kms. 3.225 to 6.400 at Chicalim Goa (Contract Agreement) No. 12/A-G/82-83 dated 28.2.1983 came to be entered between the parties. In terms of the agreement the work was completed on or before 9.2.84, but the same could not be completed on account of delays or due to various factors of obstruction, extra work and additional work which resulted in dispute relating to settlement of claim of the appellant who completed the work on 15.6.84 but because of the various disputes the final bill was not settled. In view of this, the appellant on 17.3.93 sent a letter requesting payment of claim within 15 days from the receipt thereof as otherwise claimed that in case the payment is not received within thirty days from the date of receipt of the notice, he shall invoke clause 35 of the Agreement and amount due will be recovered with interest and costs. As there was no response from the respondents, on 29.8.95 the appellant wrote to the respondent to appoint an Arbitrator to resolve the dispute and settle his claim. As the respondent failed to appoint an Arbitrator to settle the claim of the appellant on 20.6.96, the appellant filed an application under Section 20 of the Arbitration Act, 1940 in the Court of Civil Judge Senior Division.

3. The application was contested by the respondents vide their reply in which they raised a preliminary issue of limitation. The respondents were called upon to file their written statement and after written statement was filed, the learned Civil Judge S.D. Framed a preliminary issue as regards limitation and held that the applicant having informed the respondents vide his letter dated 17.3.93 that in case payment as claimed in the statement of claim incorporated in the said notice is not received within thirty days of the said notice i.e. for referring the matter to arbitration and the amount due will be recovered with interest and costs. The Court also found that the letter was received by respondent on 17.3.93 and therefore the period of 30 days would expire on 16.4.93 and the applicant ought to have filed the application under S.20 of the Arbitration Act within three years from 16.4.99. But the suit has been filed on 26.6.96 i.e. much after the lapse of three years from the said date and as the suit/application under S.20 was filed after 14.4.96, i.e. on 26.4.96 being beyond the stipulated period of three years, the application was not found to be within limitation and therefore the suit was dismissed on the ground of limitation.

4. The learned counsel appearing for the appellant submitted that the trial Court has misconstrued the scope of inquiry and matters to be considered in application under Section 20 of the Arbitration Act, 1940. It is contended that the trial Court ought to have seen from the pleadings of the parties that the appellant was agitating the issue of settlement of his bill from

time to time and sought settlement of his claim by seeking reference to arbitration. It is submitted that though the respondent has claimed that his final bill was settled in the year 1991, it was under protest as the appellant has lodged the same by giving notice along with his statement of claim and therefore the trial Court was left with no choice but to refer the matter to arbitration as it was the Arbitrator who could have adjudicated the claim of the appellant both as regards his entitlement to the claim made by him in his notice and whether it was made within the stipulated period as provided under limitation.

5. According to the learned counsel for the appellant, the starting point for limitation for filing an application under Section 20 of the Arbitration Act would arise and commence on failure of the respondent to refer the matter to arbitration after the last communication to that effect has been sent. In support of his contention, the learned counsel for the appellant has placed reliance in the case of *Chairman and M.D., N.T.P.C. Ltd. v. M/s. Reshmi Cosntructions, Builders & Contractors [2004 (1) SCCR 208]* where the Supreme Court has laid down the parameters to ascertain whether an arbitration clause in a contract agreement survives despite purported satisfaction thereof.

6. Per contra, it is the contention of the learned counsel for the respondents that in view of the fact that Art.137 of the Limitation Act 1963

would govern and is applicable for filing an application under Section 20 of the Arbitration Act, the claim made in the suit by the appellant was admittedly barred by limitation. It is submitted that factually speaking the appellant had suppressed from the Court that his claim was finally settled when the final bill was drawn and signed on 27.9.91 and received by the appellant on 27.9.91 and it was settled on 21.10.91. But even if it is accepted that the final bill was signed and settled under protest, according to the appellant himself he had sent a notice dated 17.3.93 to the respondent claiming settlement of his claim within 15 days from the receipt thereof or he would be required to initiate proceedings and refer the matter for arbitration by invoking clause 25 of the agreement under which the contract was awarded and therefore the trial Court was justified in considering the same as the cut-off date for the purpose of calculating the period of limitation and has placed reliance in the case of *Union of India v. M/s. Momin Construction Company (AIR 1995 S.C. 1927)*. It is therefore submitted that mainly because the appellant sent another notice on 29.8.95 he cannot claim that the application filed by him under the Arbitration Act before the Civil Judge S.D. was within limitation and therefore the appeal deserves to be dismissed.

7. Even if one examines the application filed by the appellant under Section 20 of the Arbitration Act, in para 13 of the said application the applicant has clearly stated that non-payment of the claim forwarded by the

applicant on 17.3.93 has given rise to the dispute and the difference between the applicant and respondent no.1. Therefore, according to the appellant himself, the cause of action arose when the respondent failed to comply with the claim made by the appellant by notice dated 17.3.93 and therefore the subsequent request made by letter dated 21.8.95 cannot be taken into consideration for the purpose of computing the period of limitation. Therefore, on facts itself the trial Court was justified in dismissing the application filed by the appellant being barred by limitation. It is well settled by a catena of decisions which has been also referred by the learned counsel for the parties i.e. M/s. Reshmi Constructions, Builders and Contractors (supra) that in order to be entitled to ask for reference under Section 20, there must be an entitlement to money and a difference of dispute in respect of the same and secondly whether the claim could be adjudicated by the Arbitrator was made within the prescribed period of limitation.

8. Insofar as the contention of the learned counsel for the appellant that the issue of limitation ought to have been left to the decision of the Arbitrator, can be well accepted in a given set of circumstances like when the issue is a mixed question of facts and law which is not the case here as from the application, reply and written statement itself, it can be made out that the application under Section 20 was filed by the appellant after the lapse of period of limitation i.e. three years in the present case (Art.137 of

the Limitation Act, 1963).

This Court finds no merit in the appeal. The same is dismissed.

J. N. PATEL, J.

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